A

JOO SENG TRADING CO

v.

COMMERCIAL IMPORTERS AND DISTRIBUTORS SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKEFLI MAKINUDIN JCA
ABDULL HAMID EMBONG JCA
C [CIVIL APPEAL NO: W-02-55-2001]
14 AUGUST 2006

CONTRACT: *Breach - Action for damages - Termination of distributorship agreement by respondent - Whether respondent's act*
D *constituted a breach of contract - Notice of termination did not give any reason for terminating contract - Whether contract-breaker entitled to justify termination on good grounds at trial - Whether termination justified*

CIVIL PROCEDURE: *Appeal - Pleadings - Issue not pleaded in*
E *memorandum of appeal - Whether issue still arguable by appellant - Essential justice - Whether grossly unfair to respondent to have to defend against an unpleaded ground of appeal*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Credibility of witnesses - Whether trial judge judicially appraised evidence of witnesses*
F *- Audio-visual advantage of trial judge - Whether a fit and proper case for appellate intervention*

This appeal was directed against the judgment of the High Court dismissing the appellant's claim for damages for breach of contract.
G The subject matter of the claim was a distributorship agreement ('agreement') entered into between the appellant and respondent in which the appellant was appointed as the respondent's distributor of cigarettes manufactured by the respondent. Disputes arose between the appellant and the respondent on the
H performance of this contract and following an exchange of correspondence, the respondent by letter terminated the agreement. The respondent's case was that the appellant acted in breach of contract and at the trial, the respondent drew the attention of the court to several instances which it said constituted
I breaches of the agreement. The learned trial judge, holding that the appellant had failed to prove its case and that the respondent

had justified its termination, accordingly dismissed the appellant's claim. In arguing this appeal, the appellant raised three issues, they being: (i) that the learned judge had erred in accepting as admissible, documents in a bundle that were in fact in serious dispute; (ii) that the notice of termination did not give any reason for terminating the contract; and (iii) that the learned judge did not judicially appraise the evidence that was led before her *ie*, having regard to the nature and quality of the evidence of the witnesses who testified at the trial, she ought to have preferred the evidence of the appellant's witnesses to that of the respondent's.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The appellant frankly conceded that the first issue did not form a ground of appeal. Thereupon, the respondent objected to the ground being argued since she was disadvantaged. After considering the objection, this court ruled that it was not open to the appellant to argue the point since it had not been pleaded in its memorandum of appeal. This was a question not of mere procedure but of essential justice. The point had not been taken in the court below to afford the learned judge the opportunity to comment upon it. In any event, it would be grossly unfair to the respondent to have to defend the judgment of the High Court on an unpleaded ground of appeal. (para 4)

(2) It is settled law that where a contract-breaker gives no reason or gives a bad reason for terminating a contract, he or she is entitled at the trial to justify the termination on good grounds. Hence, although the respondent did not give any reasons in its letter of termination, it was entitled to justify its termination of the agreement at the trial on a sustainable ground. The respondent was able to demonstrate to a conviction that in several parts of the notes of evidence, there were admissions of breaches made by the appellant's witnesses under cross-examination. Accordingly, there was no merit in this ground of complaint. (paras 5 & 6)

(3) When this court hears an appeal of this nature where findings of fact are made that turn upon the credibility of witnesses, it applies the observations of Lord Shaw of Dunfermline in the case of *Clarke v. Edinburgh Tramways*. Applying them once again here, this court was satisfied that this was not a fit and

proper case for it to intervene and disturb the findings of fact made by the learned judge, who had the audio-visual advantage at the trial. (paras 8 & 9)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana menolak tuntutan perayu untuk mendapatkan gantirugi kerana kemungkiran kontrak. Teras tuntutan perayu adalah suatu perjanjian pengedaran ('perjanjian') yang dimasuki oleh perayu dan responden, di mana perayu dilantik sebagai pengedar bagi rokok-rokok keluaran responden. Pertikaian berbangkit antara kedua pihak berhubung pelaksanaan perjanjian, dan ekoran beberapa surat menyurat responden yang menamatkan perjanjian. Kes responden adalah bahawa perayu bertindak secara yang melanggar kontrak, dan di pendengaran, responden menarik perhatian mahkamah kepada beberapa peristiwa yang dikatakannya menunjuk kepada pelanggaran tersebut. Yang arif hakim bicara berpendapat bahawa perayu gagal membuktikan kesnya dan bahawa penamatan kontrak adalah berjustifikasi, dan dengan itu menolak tuntutan perayu. Dalam hujahnya di rayuan ini, perayu telah membangkitkan isu-isu berikut, iaitu: (i) bahawa yang arif hakim khilaf kerana menerima-masuk satu ikatan dokumen yang menjadi pertikaian serius; (ii) bahawa notis penamatan tidak memberi sebarang alasan untuk menamatkan kontrak; dan (iii) bahawa yang arif hakim tidak menyelami keterangan yang ada di hadapannya dengan penuh kehakiman, iaitu, atas keterangan dan halkeadaan kes beliau sepatutnya menerima keterangan saksi-saksi perayu berbanding keterangan saksi-saksi responden.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram JCA:

(1) Perayu secara terus terang mengakui bahawa isu pertama bukan merupakan alasan rayuan. Oleh itu, reasponden membantah untuk isu itu dihujahkan kerana ia akan menjejaskan kedudukannya. Setelah menimbang bantahan, mahkamah ini memutuskan bahawa adalah tidak terbuka bagi perayu untuk menghujahkan perkara tersebut kerana ia tidak diplidkan di dalam memorandum rayuannya. Ini bukan semata-mata satu persoalan prosedur tetapi adalah satu persoalan keadilan asasi. Persoalan ini tidak dibangkit di mahkamah di bawah bagi membolehkan yang arif hakim membuat komen

mengenainya. Apapun, amat tidak adil untuk responden mempertahankan keputusan Mahkamah Tinggi atas satu alasan rayuan yang tidak pernah pun diplidkan.

(2) Sudah menjadi undang-undang mantap bahawa di mana pelanggar kontrak tidak memberi sebarang alasan ataupun memberi alasan lemah dalam menamatkan kontrak, dia masih boleh menjustifikasikannnya dengan memberikan alasan-alasan yang kukuh semasa pendengaran. Maka itu, walaupun responden tidak memberi sebarang sebab dalam surat penamatannya, beliau masih boleh berbuat demikian semasa pendengaran kes bagi menjustifikasikan penamatan itu. Responden telah membuktikan, melalui bahagian-bahagian tertentu nota keterangan, bahawa saksi-saksi perayu telah membuat pengakuan semasa soal balas bahawa memang berlaku pelanggaran terhadap kontrak. Oleh itu, tidak ada merit pada bantahan ini.

(3) Apabila mahkamah mendengar rayuan seperti ini di mana dapatan-dapatan fakta dibuat berkait dengan kebolehpercayaan saksi-saksi, maka pemerhatian Lord Shaw of Dunfermline di dalam *Clarke v. Edinburgh Tramways* akan digunapakai oleh mahkamah. Dengan menggunapakai pemerhatian tersebut, mahkamah berpuas hati bahawa ini bukanlah kes yang sesuai untuk mahkamah ini campurtangan dan mengganggui dapatan-dapatan fakta yang dibuat oleh yang arif hakim, yang jelas mempunyai manfaat pandang dan dengar di perbicaraan.

Case(s) referred to:

Boston Deep Sea Fishing & Ice Co v. Ansell [1888] LR 39 Ch D 339 ***(refd)***
Clarke v. Edinburgh Tramways [1919] SC (HL) 35 ***(foll)***
Panchaud Freres SA v. Etablissements General Grain Co [1970] 1 Lloyd's Rep 53 ***(refd)***
Taylor v. Oakes, Roncoroni & Co [1922] 38 TLR 349 ***(refd)***

For the appellant - Ebenezer Ramesh; M/s Azlin Alahakone & Assoc
For the respondent - Shanti Mogan; M/s Shearn Delamore

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-23-19-1993]

Reported by Suresh Nathan

A

JUDGMENT
(Oral)

Gopal Sri Ram JCA (delivering judgment):

B **[1]** This is the judgment of the court.

[2] This appeal is directed against the judgment of High Court dismissing plaintiff's claim for damages for breach of contract. The subject matter of the claim is a distribution agreement entered into between appellant and respondent and dated 1 November 1988. C By that agreement, the appellant was appointed as the respondent's distributor of cigarettes manufactured by the respondent. Clause 19 of that agreement, which lies at the heart of the dispute, between the parties reads as follows:

D 19(a) your distributorship shall be terminated forthwith on the occurrence of the following events:

(i) if you fail to perform or commit a breach of any of the terms and conditions of this agreement or other terms and conditions that may be implemented in the future.

E

(ii) if disagreement of any nature shall arise between the partners or the board of directors of your Company whereby we deem our interest may be imperiled.

(iii) If you or any of your partner shall be incapacitated, die F or retire from the partnership.

(iv) if an application is made or threatened to be made, to have you declared a bankrupt or to wind up your Company or put under receivership.

G (v) if there is any change in the control, management and composition of your partnership or your board of directors, or voting power or shareholding in the partnership of Company.

H 19(b) Not withstanding Clause 19(a) above, your distributorship may be terminated at any time by either party by giving one month's notice in writing to the other without assigning any reason whatsoever therefore and neither party shall have any claim whatsoever against each other in respect of such termination.

I

[3] Disputes arose between the appellant and the respondent on the performance of this contract. Following an exchange of correspondence, the respondent by a letter dated 9 March 1992 terminated the agreement in question. Basically, the respondent's case in court below and before us is that the appellant acted in breach of contract. At the trial, the respondent drew the attention of the court to several instances which it said constituted breaches of the distributorship agreement. The learned judge after hearing the evidence of both sides held that the appellant had failed to prove its case and that the respondent had justified its termination. She accordingly dismissed the appellant's claim.

[4] In arguing this appeal, learned counsel raised three issues. First, he submitted the learned judge had erred in accepting as admissible, documents in a bundle that were in fact in serious dispute. When we put to counsel whether this formed a ground of appeal, he frankly conceded that it did not. Thereupon, learned counsel for the respondent rose to object to the ground being argued as she was disadvantaged. After considering the objection, we ruled that it was not open to the appellant to argue the point as it had not been pleaded in its memorandum of appeal. This is a question not of mere procedure but of essential justice. The point had not been taken in the court below to afford the learned judge the opportunity to comment upon it. In any event, it would be grossly unfair to counsel for the respondent to have to defend the judgment of the High Court on an unpleaded ground of appeal.

[5] The next point that was taken by the appellant was this. The notice of termination, the appellant says, does not give any reason for terminating the contract. But it is settled law that where a contract breaker gives no reason or gives a bad reason for terminating a contract, he or she is entitled at the trial to justify the termination on good grounds. So, in *Boston Deep Sea Fishing & Ice Co v. Ansell* [1888] LR 39 Ch. D 339, a master dismissed a servant on alleged acts of misconduct which they were not able to substantiate at the material time. The servant had in fact received a secret commission, a fact which only came to light after the dismissal. The court held that the master could rely on the after-acquired evidence of misconduct and the dismissal was upheld on that ground. So too in *Taylor v. Oakes, Roncoroni & Co* [1922] 38 TLR 349, a buyer of goods rejected them for a bad reason. At the trial, the seller's claim was dismissed because the

buyer was able to justify the breach for a good reason. The only exception to this principle lies in the doctrine of estoppel. If a contract breaker has conducted himself or herself towards the innocent party so as to lead the latter to believe that no other ground for termination is being or will be advanced, then the contract breaker will not be permitted by the court to introduce a fresh ground of justification at the trial. See; *Panchaud Freres SA v. Etablissements General Grain Co* [1970] 1 Lloyd's Rep. 53, particularly, the judgments of Lord Denning MR and Winn LJ.

[6] So too here. Although the respondent did not give any reasons in its letter of termination, it was entitled to justify its termination of the distributorship agreement at the trial on a sustainable ground. Learned counsel for the respondent was able to demonstrate to a conviction that in several parts of the notes of evidence there were admissions of breaches made by the appellant's witnesses under cross examination. Accordingly, we find no merit in this ground of complaint.

[7] Thirdly, it was submitted by learned counsel for the appellant that the learned trial judge did not judicially appraise the evidence that was led before her. It was argued that having regard to the nature and quality of the evidence of the witnesses who testified at the trial, the trial judge ought to have preferred the evidence of appellant's witness to that of respondent's.

[8] It is trite that whether there has been a breach of contract in a given case is a question that turns upon the facts of a particular case. No principle can be drawn from an examination of the decided cases because those cases turn on their individual and peculiar facts. When this court hears an appeal of this nature where findings of fact are made that turn upon the credibility of witnesses, its role is best described by Lord Shaw of Dunfermline in *Clarke v. Edinburgh Tramways* [1919] SC (HL) 35, at 36, where said this:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he

> believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileged of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[9] This court has applied these observations on numerous occasions. Applying it once again here, we are satisfied this is not a fit and proper case for us to intervene and disturb the findings of fact made by the judge who had the audio visual advantage at the trial.

[10] For the reasons already given this appeal fails. It is dismissed. The appellant must pay the respondent the costs of this appeal. All orders of the High Court are affirmed. The deposit in court shall be paid out to the respondent to account of taxed costs.